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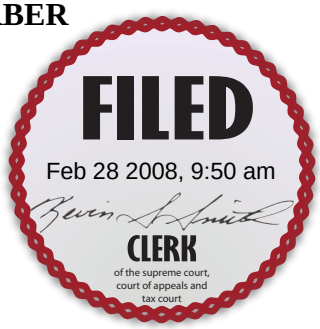

IN THE
COURT OF APPEALS OF INDIANA

JONATHAN E. SAPP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0710-CR-454
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
Cause No. 03C01-0705-FC-1116

February 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Following a guilty plea, Jonathan E. Sapp appeals his eight-year sentence for class C felony battery. We affirm.

Issues

We restate the issues as follows:

I. Whether the trial court abused its discretion in sentencing Sapp; and

II. Whether Sapp's sentence is inappropriate in light of the nature of the offense and his character.

Facts and Procedural History

Sapp told the probation officer who prepared the presentence investigation report ("PSI") that on May 18, 2007, he and his girlfriend were at the home of a friend who asked him to get David Walters out of the house. Sapp and his girlfriend drove Walters into rural Bartholomew County in Sapp's girlfriend's car "with the intent to drop him off so it would take him a long time to walk back into town." Appellant's App. at 60 (PSI).[1] Walters did not want to get out of the car, but Sapp made him do so. Sapp and his girlfriend then returned to his friend's home. Sapp decided that he had not driven Walters "far enough into [the] country" and drove off in his truck to search for Walters. *Id.* Sapp saw Walters "as he was walking back into town" and offered him a ride. *Id.* Unaware that Sapp was driving, Walters climbed into the bed of the truck. Sapp drove Walters farther out into the country

[1] We note that Sapp's counsel included Sapp's PSI in the appellant's appendix. Indiana Administrative Rule 9(G)(1) states that the information therein "is excluded from public access and is confidential." Indiana Trial Rule 5(G)(1) requires that such documents be separately identified and "tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

and told him to get out of the truck. Walters refused and then fell out of the truck. The two men fought, and Sapp hit Walters.

The police officer who responded to a report of the altercation went to the hospital to talk with Walters, who had "significant visible injuries to the head and face area." *Id*. at 13 (probable cause affidavit). Walters reported that Sapp had stolen his wallet.[2] On May 23, 2007, the State charged Sapp with Count I, robbery as a class C felony (knowingly taking U.S. currency from Walters by using or threatening the use of force);[3] Count II, theft as a class D felony (knowingly exerting unauthorized control over Walters's currency with intent to deprive him of any part of its value or use);[4] and Count III, battery as a class A misdemeanor (knowingly or intentionally touching Walters in a rude, insolent, or angry manner resulting in bodily injury to Walters).[5]

In a letter dated August 5, 2007, the prosecutor offered to let Sapp plead guilty to Count III, which would be amended to battery as a class C felony "to include the element of serious bodily injury";[6] the prosecutor would dismiss the two remaining charges, and "the maximum *executed* sentence which [Sapp] may receive [would be] three years[.]" *Id*. at 30 (emphasis added). On August 6, 2007, Sapp signed a change of plea form and appeared at a

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[2] In his PSI statement, Sapp denied stealing Walters's wallet. Appellant's App. at 60.

[3] Ind. Code § 35-42-5-1(1).

[4] Ind. Code § 35-43-4-2(a).

[5] Ind. Code § 35-42-2-1(a)(1)(A).

[6] Ind. Code § 35-42-2-1(a)(3).

change of plea hearing. The trial court recited the terms of the State's plea offer, and Sapp stated that he understood them. Tr. at 3. The court asked Sapp if he understood that "a C Felony carries two to eight years in prison and up to a Ten Thousand Dollar fine[.]" *Id*. at 9.[7] Sapp stated that he did. Sapp then admitted that he knowingly touched Walters in a rude, insolent, or angry manner that resulted in serious bodily to Walters, including extreme pain. *Id*. at 11.[8] The court took the change of plea under advisement, ordered a PSI, and set the matter for sentencing.

At the sentencing hearing on September 4, 2007, the prosecutor explained,

> The State crafted this particular [plea] agreement because the original offer in this case had been for the defendant to plead guilty to Counts Two and Three and apparently there was some concern that they may not be able to lay a factual basis on those two crimes. So the State, for that reason, we respectfully ask the Court to accept the plea agreement.

Id. at 17. The court initiated a sidebar conference, during which the prosecutor explained that she had originally offered to let Sapp plead guilty to class A misdemeanor battery and class D felony theft, which carries a three-year maximum sentence,[9] with the sentences on those convictions to run concurrently. The prosecutor stated that she then offered to let Sapp plead guilty to the amended charge of class C felony battery, "with a three year cap on it, which is the same as the other would have been." *Id*. at 18. The court pointed out, and both attorneys agreed, that the sentences would not be the same because there could be "[s]uspended time on top" of a three-year executed sentence for a class C felony. *Id*.

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[7] Ind. Code § 35-50-2-6.

[8] *See* Ind. Code § 35-41-1-25 (defining "serious bodily injury" in pertinent part as "bodily injury that creates a substantial risk of death or that causes … extreme pain").

After the sidebar conference, the trial court asked Sapp the following questions:

> [COURT]: Mr. Sapp, before I sentence you, do you understand that the Court is … I want to make sure you do understand, the Court is limited in the executed portion of the sentence the Court can give to you to three years, if the Court accepts this plea agreement?
>
> [SAPP]: Yes.
>
> [COURT]: But you do understand the Court can sentence you up to eight years, suspend five years, sentence you to three years and put you on probation for up to five years. Do you understand that?
>
> [SAPP]: Yes.

Id. at 19.[10]

The trial court then accepted Sapp's guilty plea and sentenced him as follows:

> Okay, the defendant having entered a plea of guilty, the Court accepts the plea of guilty and enters a judgment of conviction for Battery, as a Class C Felony. Finds there are aggravating circumstances, significant aggravating circumstances and no mitigating circumstances. The first aggravator is, the lengthy criminal history dating back to the defendant's juvenile days back in 1989 when he admitted to the crime of Theft. And since that time, he now has accumulated 14 criminal convictions, six of which are felonies. So '89 was a Theft in February and then '89 in June, was a second Theft. '93 was an Illegal Consumption. In '92, Operating a Vehicle Without Ever Having Obtained an Operator's License. '93 was Illegal Consumption and Resisting Law Enforcement. '94 was a Theft. That's September of '94. And then in Superior Court One, oops, I counted one twice. So I'm going to cross off one of those. This one was transferred in, so I won't count that one and that's the

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[9] Ind. Code § 35-50-2-7.

[10] It is well settled that a defendant may not claim on direct appeal that his guilty plea was not made knowingly or voluntarily. *Jones v. State*, 675 N.E.2d 1089-90 (Ind. 1996). Such an issue "should be pursued by filing a petition for post-conviction relief." *Id*. at 1090. In this direct appeal, Sapp's counsel makes much ado about the supposed confusion regarding Sapp's sentence that arose during the sidebar conference and states, "This is not an argument that Sapp's plea was not knowingly, intelligently, and voluntarily made — but it comes close." Appellant's Br. at 12. This nearly paradoxical statement calls to mind the surrealist painter René Magritte's painting of a pipe, which bears the caption, "This is not a pipe." Because we are jurists, rather than trained philosophers, we are at a loss as to how to respond to an argument that is not an argument. Perhaps we may come close by observing that Sapp's colloquy with the trial court indicates that he fully understood—and did not object to—the extent of the court's sentencing discretion pursuant to the plea agreement.

> Illegal Consumption and Resisting. '95 was a Criminal Mischief. '96 was the Illegal Consumption and in … that was March and then June of '96 was another Illegal Consumption and then August of '96 was the Receiving Stolen Property. '97 was a Burglary as a C Felony and Escape as a C Felony. 2003, OMVUI and now we're here in 2007 for the Battery. So it's actually a total of 13 not 14. But six of which are felonies.
>
> Okay. That's a significant aggravator. Another aggravator is he's been placed on probation and has violated that three times and the final aggravator is that he's been offered treatment outside a penal facility that has not been effective.
>
> I'm going to sentence you to the Indiana Department of Corrections [sic] for a period of eight years, suspend five and place you on probation for a period of five years.… Make restitution to the victim in the amount Eighty-Seven Fifty, at the rate of Twenty Dollars per week with your first payment due 150 days after your release. Complete 24 hours of community service any week in which you are not employed on a full time basis or a full time student.… Be placed on Community Corrections for a period of 12 months for purposes of assessment and determination of appropriate programming. You're required to comply with the specific programs recommended by Community Corrections which may include day reporting, electronic monitoring, counseling or educational programs.

Id. at 20-22. Sapp now appeals his sentence.

Discussion and Decision

I. Abuse of Discretion

So long as a defendant's sentence is within the statutory range, the trial court's sentencing decision is subject to review only for abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) ("*Anglemyer I*"), *clarified on reh'g*, 875 N.E.2d 218 ("*Anglemyer II*").

> An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.
>
> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not

> support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Anglemyer I, 868 N.E.2d at 490-91 (citations and quotation marks omitted).

Sapp contends for the first time on appeal that the trial court abused its discretion by failing to find his guilty plea as a mitigating circumstance. The State acknowledges that "[a] guilty plea is one exception to the rule that a potential mitigator must be advanced at the trial court level in order to be preserved for appeal" and that "'a defendant who pleads guilty deserves some mitigating weight be given to the plea in return.'" Appellee's Br. at 7 (quoting *Anglemyer II*, 875 N.E.2d at 220) (quotation marks omitted). As our supreme court further observed in *Anglemyer II*, however,

> an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. And the significance of a guilty plea as a mitigating factor varies from case to case. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility, or when the defendant receives a substantial benefit in return for the plea.

875 N.E.2d at 220-21 (citations omitted).

Sapp contends that his guilty plea is a significant mitigating factor because he agreed to plead "to a more serious charge than had originally been filed to allow the [S]tate to have a charge for which he could receive three years executed." Appellant's Br. at 7. As such, his plea "put him at risk for a sentence much more serious than the sentence that the State had originally offered to resolve this matter." *Id.* Sapp notes that the State was unsure whether it

could lay a foundation for the class D felony theft charge and that he "pled guilty about two and a half months after the charges were filed against him." *Id*. at 8. In sum, Sapp claims that he "offered a significant accommodation to the State and received very little in return." *Id*. at 7.

The State responds as follows:

> [I]n exchange for his plea, [Sapp] received the benefit of at least a five-year reduction in his executed sentence by the cap on the executed portion of his sentence of three years. This was a substantial benefit, especially considered in light of [Sapp's] notable criminal history. [Sapp] has not demonstrated that his guilty plea was a significant mitigating circumstance. Had the trial court mentioned the guilty plea as a mitigating factor, it would have dismissed it as insignificant.

Appellee's Br. at 7.

To the extent that Sapp's guilty plea was entitled to any consideration as a mitigating circumstance, we believe that its significance pales in comparison to the aggravating circumstances of his probation violations, unsuccessful treatment, and extensive criminal history, which the trial court recited in detail. We can confidently say that the trial court would have imposed the same sentence had it found the guilty plea to be a mitigating factor. Under these circumstances, we see no reason to remand for resentencing.

II. Inappropriateness

Indiana Appellate Rule 7(B) provides that this Court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." A defendant must persuade the appellate court that his sentence has met the inappropriateness standard of review. *Anglemyer I*, 868 N.E.2d at 494. "[R]egarding the

nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed. The advisory sentence for a Class C felony is four years. *See* I.C. § 35-50-2-6(a)." *Id.* (citation omitted). To reiterate, Sapp received an eight-year sentence, with three years executed and five years suspended to probation.

Sapp first contends that the nature of his battery on Walters was not particularly egregious. The State points out that Sapp struck Walters in the face and head and abandoned him in a remote rural area, which bespeaks a wantonness and callousness beyond that inherent in a garden-variety class C felony battery.

As for Sapp's character, we agree with the State's assessment that he is "an accomplished recidivist." Appellee's Br. at 21. It is true, as Sapp claims, that "[t]he significance of a defendant's criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the current offense." *Field v. State*, 843 N.E.2d 1008, 1011 (Ind. Ct. App. 2006), *trans. denied*. Although the nature of Sapp's prior convictions bears little relation to the instant offense, their sheer number demonstrates that he has utterly no qualms about breaking the law. Moreover, Sapp's three probation violations indicate that he is unable to conform his behavior to societal norms even under close State supervision. In sum, Sapp has failed to persuade us that his sentence is inappropriate in light of the nature of the offense and his character. Therefore, we affirm his sentence.[11]

[11] To the extent Sapp contends that maximum sentences are "generally most appropriate for the worst offenders[,]" Appellant's Br. at 26, we reiterate that

Affirmed.

BAILEY, J., and NAJAM, J., concur.

> [i]f we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. In order to determine whether an offense fits that description, we would be required to compare the facts of the case before us with either those of other cases that have been previously decided, or—more problematically—with hypothetical facts calculated to provide a "worst-case scenario" template against which the instant facts can be measured. If the latter were done, one could always envision a way in which the instant facts could be worse. In such case, the worst manifestation of any offense would be hypothetical, not real, and the maximum sentence would never be justified.
>
> This leads us to conclude the following with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, thus justifying the maximum sentence: We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), *trans. denied*.